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No. 75-465

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In the Supreme Court of the United States

OCTOBER TERM, 1975

JERSEY CENTRAL POWER & LIGHT CO.,
CROSS-PETITIONER,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
et al.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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MEMORANDUM OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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On July 22, 1974, Jersey Central Power & Light Co. filed suit in the District Court of New Jersey for declaratory judgment naming the Equal Employment Opportunity Commission, other government agencies, and the unions with which Jersey Central has collective bargaining agreements as defendants. Jersey Central asked the district court for judgment

declaring its rights and obligations under its collective bargaining agreements, its conciliation agreement with E.E.O.C., Title VII of the Civil Rights Act of 1964, and Executive Order 11246 with respect to the layoff of a substantial number of employees which was about to take place.

On motion for summary judgment the district court held that there was a conflict between the collective bargaining agreement and a later-executed conciliation agreement signed by Jersey Central, the unions, and the E.E.O.C. Applying contract law, the court held that both agreements should be given maximum effect but that the "seniority provisions of the collective bargaining agreement cannot be construed in such a manner as to frustrate the affirmative action commitments contained in the Conciliation Agreement." The court emphasized that it was granting *partial* summary judgment and not terminating the action.

On interlocutory appeal, a panel of the Court of Appeals reversed, finding no conflict between the two agreements. A majority of the panel then undertook to examine whether "an overriding public policy dictates a modification of the collective bargaining agreement." The panel majority held that this question could be answered only by determining whether the layoff system violated Title VII of the Civil Rights Act of 1964. The panel majority stated that, where a company-wide seniority system exists, the only relevant consideration in determining whether the collective bargaining agreement should be re-

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formed is evidence directed at the *bona fide* character of the system: "that is, evidence directed either to the neutrality of the seniority system or evidence directed to ascertaining an intent or design to disguise discrimination."

The E.E.O.C. filed a petition for rehearing in the Court of Appeals arguing that evidence of unlawful hiring discrimination occurring after the effective date of Title VII was also highly probative of whether the use of the seniority system to determine layoffs violates public policy, as reflected in Title VII. When the court denied the petition, the E.E.O.C. filed a timely petition in this Court seeking review of that issue. No. 75-182, filed August 1, 1975.

Subsequently, Jersey Central filed a cross-petition for review of the panel majority's remand of the action, which permits the district court to receive evidence and to determine whether the seniority system used in the layoffs was designed or intended to disguise discrimination.

1. The cross-petition should be denied as untimely. The judgment of the Court of Appeals was entered January 30, 1975. A petition for rehearing by E.E.O.C. was denied March 4, 1975. On May 27, 1975, Mr. Justice Brennan extended the Commission's time for filing a petition for a writ of certiorari to and including August 1, 1975, and the Commission's petition was filed on that date. The cross-petitioners sought no extension of time to file a petition. Their cross-petition was not filed until September 24, 1975—almost nine months after the

aspect of the ruling of the Court of Appeals which they seek to have reversed, and 204 days after the Court of Appeals' denial of rehearing. The cross-petition is therefore untimely under 28 U.S.C. § 2101 (c).

The 90-day statutory period for the filing of a petition for a writ of certiorari in a civil case is jurisdictional. See *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206; *Department of Banking* v. *Pink*, 317 U.S. 264. Neither the statute nor this Court's Rules make any exception for cross-petitions.

The cross-petition (at 2-3) seeks to rely on *Pierson* v. *Ray*, 386 U.S. 547, as authorizing the filing of untimely cross-petitions. Although the Court there granted an apparently out-of-time cross-petition, the cross-respondents did not suggest any jurisdictional defect in the cross-petition, and this Court did not address the issue either in its order granting certiorari (384 U.S. 938) or in its subsequent opinion in the case.[1]

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[1] Although the current edition of Stern and Gressman, *Supreme Court Practice* (1969), notes that *Pierson* v. *Ray* appears to depart from the normal practice, it reiterates that conditional cross-petitions usually must be filed within the statutory time period. "Normally, a cross-petitioner who seeks review only if the original petition is granted is subject to the same time requirements as the petitioner and must file his cross-petiiton within the same required time (usually 90 days) or obtain an extension of time in which to file the cross-petition, quite apart from what the petitioner may do in this respect" (*Id.* at 311).

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2. Even if this Court determines that the untimeliness of a cross-petition is not a jurisdictional defect and that the Court may in its discretion consider an out-of-time cross-petition on its merits, we submit that, in the absence of a Rule of this Court to the contrary, that discretion should be exercised only in exceptional circumstances where good cause is shown for the delay. There are no such exceptional circumstances here. The ruling of the Court of Appeals that the layoff provisions of the collective bargaining agreement could not violate Title VII unless the Commission (or any other party to the suit) demonstrated that the layoff system was intended or designed to disguise discrimination was set forth in the initial opinion of the Court of Appeals issued on January 30, 1975, almost nine months before the cross-petition was filed. The company has thus for a long time been aware that the issue of intention to discriminate remained in the case. Indeed in reply to questions posed by the district judge following the Court of Appeals decision, cross-petitioners wrote:

> The Court's remand allows the parties the opportunity, if desired, to offer evidence on the *bona fide* character of the company-wide seniority system. Irrespective of whether such evidence is presented or not, entry of partial summary judgment at this time is appropriate. I.e., absent evidence demonstrating that the seniority system is not bona fide, the seniority provisions of the collective bargaining agreement here involved shall be followed in the event of layoffs.

> As we understand the remand order and its explanation, the first stage of the evidentiary process would be considerably more narrow than the scope of Title VII. The inquiry would focus only on (1) the terms of the seniority provisions, i.e., is it facially neutral, and (2) evidence relevant to the question of intent to disguise the seniority system as a discriminatory device.

Thus the company, with full knowledge of the issues left open by the Court of Appeals decision, did not, until the cross-petition, take the position that the Commission is estopped from contesting the bona fides of the seniority system insofar as it may embody an intention to discriminate.

The only explanation for the delay in raising the issue offered by the company is that the Commission's petition presents "an issue quite different from, those issues presented to the courts below." The Commission's petition does no such thing. The question of whether layoffs by company seniority would violate, not only the conciliation agreement, but Title VII, was in the case from the beginning on the company's complaint which initiated this action. While the Commission urged both the District Court and the Court of Appeals not to decide the issue without a full development of the facts, the Commission has always made clear its position that, under certain circumstances, layoffs by company seniority may violate Title VII. Moreover, the specific aspect of that position with respect to the perpetuation of the effects of post-Act unlawful hiring practices was articulated in the Commission's petition for rehearing

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in the Court of Appeals. It could hardly have come as a surprise to the company that such a position would be brought before this Court if a petition for a writ of certiorari were filed.

3. In any event the petition presents no issue of merit. The company, in reply to the Commision's petition for a writ of certiorari, has asserted its theory that the Commission, by virtue of its signature to the conciliation agreement, is estopped from claiming that the seniority system perpetuates the effect of post-1965 unlawful discrimination in hiring. As we point out in our reply brief, this is not a proper interpretation of the conciliation agreement. Rather, since, as the district court found, the conciliation agreement did not deal with the question of general layoffs, the issue of whether the layoffs constitute a violation of Title VII is new matter, not covered by the conciliation agreement. It is therefore subject to judicial determination in a proper case under the express terms of the conciliation agreement, providing that the Commission does not waive its right to sue on issues not covered by the agreement. The issue of whether the seniority system embodies an intention to discriminate is even more clearly a matter not within the contemplation of the conciliation agreement and thus, as the Court of Appeals held, a matter to be determined by the district court.

It is therefore respectfully submitted that the cross-petition should be denied.

Respectfully submitted,

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November 7, 1975

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Memorandum of the Equal Employment Opportunity Commission In Opposition were today mailed, postage prepaid, to the following counsel of record:

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